

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

with affidavit

77-1359

To be argued by
RICHARD J. MCCARTHY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1359

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS MORALES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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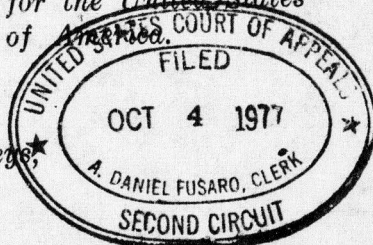


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**United States Court of Appeals
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Docket No. 77-1359

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS MORALES,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Morales appeals from a judgment of conviction entered on July 12, 1977, after a jury trial before the Honorable Charles E. Stewart, United States District Judge.

Indictment 77 Cr. 335, filed on May 3, 1977, charged defendant Morales with one count of criminal contempt for disobeying a lawful court order by refusing to answer three questions posed before the grand jury, in violation of Title 18, United States Code, Section 401(3).

Trial commenced on July 11, 1977 and ended on July 12, 1977, with the jury returning a guilty verdict. On August 24, 1977, Judge Stewart sentenced Morales to a six month term of imprisonment. This Court stayed the execution of Morales' sentence during the pendency of this appeal.

Statement of Facts

The Government's Case

Through at least April 28, 1977, a grand jury sitting in the Southern District of New York was investigating possible violations of federal laws prohibiting syndicated gambling by Anthony Salerno, a/k/a "Fat Tony", Vincent Cafaro, a/k/a "Fish", Cirino Salerno, a/k/a "Speed", and others in East Harlem during 1975 and 1976. (App. 91a-92a, 238a).^{*} In connection with this investigation Louis Morales was subpoenaed to testify before this grand jury.

Because Louis Morales was a possible target of the grand jury inquiry and, therefore, was likely to refuse to testify on the basis of his privilege against self-incrimination, the United States Attorney for the Southern District of New York, with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, applied for an order granting Morales immunity from prosecution pursuant to Title 18, United States Code, Section 6002, and directing Morales to testify before the grand jury. On March 24, 1977, United States District Judge Inzer B. Wyatt granted Morales the requested use immunity and ordered him to "give testimony which he refuses to give on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated before said Grand Jury." (App. 235a). This order by its terms became effective after March 24, 1977, if Louis Morales then refused to testify on the basis of his privilege against self-incrimination. (App. 236a).

^{*} References herein to appellant's appendix are abbreviated as "App."; references to appellant's brief are abbreviated as "Br."; references to the trial transcript are abbreviated as "Tr."

Immediately after the signing of this order, Louis Morales appeared before the grand jury, at which time Judge Wyatt's order was read and explained to him. Morales did not testify in response to the questions propounded to him but asserted that unlawful electronic surveillance had been undertaken against him. To dispose of this claim, the Government submitted copies of the wiretap order and supporting affidavits to United States District Judge Morris E. Lasker, who determined that electronic surveillance undertaken in connection with the investigation had been lawful. Judge Lasker then ordered Morales to testify before the grand jury or be held in civil contempt until such time as he did testify. (App. 92a-93a, 238a-39a).

On April 28, 1977, after the entry of Judge Lasker's order, Louis Morales was called before the grand jury. Judge Wyatt's order and Judge Lasker's ruling and order were shown and explained to him. The Assistant United States Attorney then asked Louis Morales three questions concerning his knowledge of the gambling operations of Vincent Cafaro and Anthony Salerno. In response to each question Morales asserted his Fifth Amendment privilege against self-incrimination, refusing to answer any of the three questions even when directed to do so by the foreman of the grand jury. Morales admitted that he understood the terms of Judge Wyatt's order, but he still refused to testify. (App. 94a-95a, 240a-41a).

Later that day Morales appeared before Lloyd F. MacMahon, United States District Judge, and again admitted that he was knowingly and willfully disobeying Judge Wyatt's order:

THE COURT: You understand, don't you, Mr. Morales, that you have been given immunity for anything you might say that would tend to incriminate you before the Grand Jury?

MR. MORALES: I do.

THE COURT: You understand also that you

have been ordered by the Court to answer the questions that have been put to you?

MR. MORALES: I do.

THE COURT: And those questions were put to you this morning and you refused to answer, is that correct?

MR. MORALES: Yes.

THE COURT: And you did that intentionally?

MR. MORALES: Yes.

THE COURT: Notwithstanding and with the full knowledge of the fact that the Court had ordered you to do it?

MR. MORALES: That is right.

THE COURT: You did that on purpose and are not laboring under any mistake or anything of that nature?

MR. MORALES: I know what I was doing. (App. 95a-96a, 243a-44a).

The Defendant's Case

Defendant called no witnesses and did not take the stand. (App. 96a-109a).

ARGUMENT

POINT I

Morales Was Properly Indicted For Criminal Contempt.

Defendant's first argument on appeal is that a criminal contempt action under 18 U.S.C. § 401(3) may not be initiated by indictment. However, this contention is not supported by a single citation to any decision dismissing a criminal contempt indictment, and ignores well estab-

lished case law upholding the commencement by indictment of a criminal contempt proceeding under 18 U.S.C. § 401 (3) so long as the proceeding satisfies the procedural due process requirements of Fed. R. Crim. P. 42(b).^{*} In fact, as many courts have recognized, initiating a criminal contempt proceeding by indictment rather than by notice and order to show cause ordinarily provides a defendant with due process safeguards which greatly exceed the minimal requirements of Fed. R. Crim. P. 42(b). *United States v. Eichhorst*, 544 F.2d 1383, 1387-88 (7th Cir. 1976); *United States v. Bukowski*, 435 F.2d 1094, 1103 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

The rule in the Second Circuit is that a criminal contempt proceeding, however it may be commenced, is legally sufficient under Fed. R. Crim. P. 42(b) if the defendant received actual notice and a hearing as a result of the indictment or presentment and the court proceedings

^{*} Fed. R. Crim. P. 42(b) provides for certain notice and hearing requirements which a criminal contempt proceeding must satisfy, but neither requires nor prohibits the initiation of such a contempt proceeding by indictment:

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in sub-division (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, the judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

which followed. *United States v. DeSimone*, 267 F.2d 741, 743 (2d Cir.), *vacated as moot*, 361 U.S. 125 (1959) (*per curiam*). The United States Courts of Appeals for the Fifth and Ninth Circuits have interpreted *Green v. United States*, 356 U.S. 165, 187 (1958), as approving prosecution by indictment of criminal contempt under 18 U.S.C. § 401. *Steinert v. United States District Court*, 543 F.2d 69, 70-71 (9th Cir. 1976); *United States v. Leyva*, 513 F.2d 774, 778 (5th Cir. 1975).

Defendant contends that a criminal contempt proceeding cannot be commenced against him by indictment without the express prior direction of the court to the prosecutor or to the grand jury that this be done. (Br. 5, 7-8). Defendant's argument ignores the significance of the initiation of a criminal contempt proceeding by order to show cause under Fed. R. Crim. P. 42(b) or by indictment. Each is a procedural device for the prosecutor or the grand jury, respectively, to bring to the court's attention acts which, if committed, might constitute criminal contempt. None of the pertinent case authority upholding the initiation of criminal contempt proceedings by indictment has noted or stated any need for prior referral to the grand jury by the court of a proposed indictment. See, e.g., *Steinert v. United States District Court*, *supra*, 543 F.2d at 70; *United States v. Sternman*, 415 F.2d 1165, 1167 (6th Cir. 1969), *cert. denied*, 397 U.S. 907, *rehearing denied*, 397 U.S. 1081 (1970); *United States v. DeSimone*, *supra*, 267 F.2d at 743-44.

Nor may defendant fairly argue that the initiation of a criminal contempt proceeding by indictment encroaches upon the exclusive judicial power to punish for criminal contempt under 18 U.S.C. § 401(3). Once the criminal contempt is brought to the court's attention, whether by indictment or by order to show cause, the finder of fact, which may not be the court, must first determine whether criminal contempt occurred. Only then does the court exercise its discretionary power to punish or not, by fine or imprisonment. Contrary to de-

fendant's assertions, it is the judge and not the prosecutor who determines what punishment is appropriate.

Defendant places primary reliance upon *In re Amalgamated Meat Cutters & Butcher Workmen*, 402 F. Supp. 725 (E.D. Wis. 1975), wherein the matter before the court was a motion to quash certain portions of a subpoena duces tecum issued by a grand jury. While the court in *dicta* concluded that a grand jury could not *sua sponte* inquire into matters of criminal contempt, it nevertheless recognized the authority of a grand jury to issue indictments for allegedly contemptuous conduct which occurred in the presence of the grand jury.* This is precisely what occurred in the case at bar, as Morales was indicted by the grand jury before which he refused to testify as ordered by the court. In any event, the United

*In the course of his argument defendant, relying upon *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976), claims some defect in being indicted by the grand jury before which he refused to testify. (Br. 9-10). The *Hinton* decision is completely inapposite because there the defendant had testified before a grand jury under a grant of use immunity, and was indicted by that same grand jury for violations of federal narcotics laws arising out of the matters being studied by the grand jury and concerning which the immunized testimony was given. The due process difficulties inherent in the *Hinton* case, where grand jurors were being asked to ignore a witness's immunized testimony in deciding whether or not to indict that witness, are completely absent when a grand jury has only been exposed to non-immunized "testimony"—the refusal of defendant to answer questions posed by the grand jury—in determining whether to indict. Under the latter circumstances, which are the facts in this case, the same grand jury may return the indictment for criminal contempt. *Langella v. Comm'r of Corrections*, 545 F.2d 818, 823 (2d Cir. 1976), cert. denied, 97 S. Ct. 1679 (1977).

Criminal contempt proceedings which arise out of a witness' refusal to answer questions posed by the grand jury have frequently been initiated by an indictment or presentment voted by the grand jury before which the defendant appeared and refused to testify. *United States v. Leyva*, *supra*, 513 F.2d at 776; *United States v. Sternman*, *supra*, 415 F.2d at 1167; *United States v. DeSimone*, *supra*, 267 F.2d at 743.

States Court of Appeals for the Ninth Circuit has expressly disapproved the *In re Amalgamated Meat Cutters & Butcher Workmen* decision (*Steinert v. United States District Court*, *supra*, 543 F.2d at 71 n.1), a disapproval which is consistent with the case authority in this Circuit.

Defendant cannot and does not claim that the indictment in this case and the ensuing judicial proceedings failed to meet the due process requirements of Fed. R. Crim. P. 42(b). The reading or describing in court of a grand jury indictment or presentment which sets forth the essential facts of the criminal contempt, and the scheduling of a trial date in order to provide defendant adequate preparation time, fully complies with the requirements of Rule 42(b) and 18 U.S.C. § 401(3). *United States v. Mensik*, 440 F.2d 1232, 1234 (4th Cir. 1971) (*per curiam*); *United States v. Sternman*, *supra*, 415 F.2d at 1168; *United States v. DeSimone*, *supra*, 267 F.2d at 743-44. The indictment herein specifies the lawful orders which defendant disobeyed and resisted, describes with exactness how he disobeyed those orders by refusing to answer three questions posed by the grand jury, and cites the criminal contempt statute (18 U.S.C. § 401(3)) which defendant allegedly violated. (App. 2a). Morales was arraigned on May 12, 1977, and, therefore, was informed by the court of the charges against him. (App. 1a). The court set July 11, 1977, as the trial date, giving defendant adequate time to prepare his defense. Therefore, this criminal contempt proceeding, initiated by indictment, satisfies all the requirements of 18 U.S.C. § 401(3) and Fed. R. Crim. P. 42(b).

Defendant also argues that civil and criminal contempt proceedings brought for the same acts of contempt constitute double jeopardy or a violation of Fifth Amendment due process. This argument and reasoning ignore well established case authority which has clearly distin-

guished civil and criminal contempt proceedings, and has recommended that civil contempt remedies be exhausted before commencing criminal contempt proceedings for the same act. *Shillitani v. United States*, 384 U.S. 364, 371 n.9 (1965).^{*} A judgment imposed after holding a person in civil contempt is not punishment but, rather, is a term of conditional imprisonment imposed for the benefit of other parties to secure compliance with judicial decrees. *Id.* at 368. The distinctly criminal and civil nature of these different sanctions avoids any possible double jeopardy problem:

"The civil and criminal sentences [serve] distinct purposes, the one coercive, the other punitive and deterrent; that the same act may give rise to these distinct sanctions presents no double jeopardy problem. *Rex Trailer Co. v. United States*, 350 U.S. 148, 150, 76 S.Ct. 219, 220, 100 L.Ed. 149 (1956); *United States v. United Mine Workers*, 330 U.S. 258, 299, 67 S.Ct. 677, 698, 91 L.Ed. 884 (1947)." *Yates v. United States*, 355 U.S. 66, 74, 78 S.Ct. 128, 133, 2 L.Ed. 2d 95 (1957). (Civil and criminal sanctions imposed for one contempt of a continuing nature.)

United States v. Marra, 482 F.2d 1196, 1202 (2d Cir. 1973); see *United States v. Aberbach*, 165 F.2d 713, 714 (2d Cir. 1948); *Backo v. Local 281, United Brotherhood of Carpenters and Joiners*, 308 F. Supp. 172, 175 (N.D. N.Y.), *aff'd*, 438 F.2d 176 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971).

^{*} Defendant relies upon two decisions, *Person v. Association of the Bar*, 554 F.2d 534, 536-37 (2d Cir. 1977) and *Erdman v. Stevens*, 458 F.2d 1205, 1209 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), which characterized state disbarment proceedings as more comparable to criminal than to civil proceedings. However, this analysis was in the context of assessing considerations of comity for purposes of *Younger v. Harris*, 401 U.S. 37 (1971), and has no relevance here.

Defendant Morales was afforded every procedural protection recommended by the Court in the *Shillitani* and *Marra* decisions for companion civil and criminal contempt proceedings, including the utilization of a separate civil contempt action in advance of any criminal contempt proceeding (on notice and with a right to a jury trial) to give the defendant every opportunity to cleanse himself of contempt. Morales was first held in civil contempt, and was ordered imprisoned until the expiration of the term of the grand jury or until he purged himself of contempt by testifying before the grand jury. Morales did not testify, and was released four days later at the Government's request because the grand jury investigation had ended. (App. 16-17). It was only after civil remedies had failed to obtain compliance with the court's order that the criminal contempt action was commenced separately by indictment and was tried before a jury.

POINT II

Morales Was Not Entitled To Contest The Legality Of The Electronic Surveillance.

Morales' second argument on appeal is that the District Court erred in denying him copies of the orders and affidavits supporting electronic surveillance undertaken in the investigation in which he committed his contempt. He claims that he was entitled to these documents for the purpose of raising a defense in the criminal contempt case, and he also contends that he was entitled to a "full-blown suppression hearing". (Br. 13-14).

The background for this claim is as follows: On February 24, 1977 the Assistant United States Attorney informed Morales in advance of his appearance before the grand jury that his conversations had been inter-

cepted at one of two locations subject to electronic surveillance pursuant to court order. (Tr. 205a-06a). When Morales, on March 24, 1977, inquired whether any questions to be posed before the grand jury were based upon electronic surveillance, the Government obtained a judicial determination of the legality of the electronic surveillance through an order to show cause asking the court to direct Morales to comply with Judge Wyatt's order. (App. 222a-23a, 246a).

The Government submitted for judicial review a court order authorizing electronic surveillance at the two locations, together with the supporting affidavits. The Assistant United States Attorney assigned to the investigation from its inception and the FBI agent in charge of the investigation also submitted affidavits swearing that the only electronic surveillance which Morales intercepted or was conducted on premises in which Morales had a proprietary interest, occurred pursuant to the court order. (App. 231a-32a).

Judge Lasker requested affidavits from Morales, heard argument, and ruled (1) that the electronic surveillance order was facially sufficient, and (2) that the affidavits of the Assistant United States Attorney and FBI agent met the requirements of 18 U.S.C. § 3504. Accordingly, Morales was directed to testify or be held in civil contempt until such time as he did testify (*Id.* App. 245a-55a). Despite the court's express reminder that any adverse determination may be appealed (App. 254a), defendant appealed neither Judge Lasker's order nor the final judgment of commitment for civil contempt.

Against this background, it is apparent that at the later stage of his criminal contempt trial, Morales was not entitled to litigate the lawfulness of the electronic surveillance. Contrary to his assertion, the lawfulness

of the electronic surveillance was not a possible defense in his trial for criminal contempt. A criminal contempt proceeding brought pursuant to 18 U.S.C. § 401(3) does not permit the defense of "just cause shown" which is specifically available when a person is charged with civil contempt under 28 U.S.C. § 1826(a). It is well established that the invalidity of a court order is not a defense in a criminal contempt proceeding alleging its disobedience. *Walker v. City of Birmingham*, 388 U.S. 307, 314-15 (1967); *United States v. Seale*, 461 F.2d 345, 361 (7th Cir. 1972); *United States v. Bukowski*, *supra*, 435 F.2d at 1108; *United States v. Hammond*, 419 F.2d 166, 168 (4th Cir. 1969), *cert. denied*, 397 U.S. 1068 (1970); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Leighton v. Paramount Pictures Corp.*, 340 F.2d 859, 861 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965); *Backo v. Local 281, United States Brotherhood of Carpenters and Joiners of America*, *supra*, 308 F. Supp. at 176-77. An order issued by a court with jurisdiction must be obeyed by the parties until it is reversed by orderly and proper proceedings. *United States v. United Mineworkers*, 330 U.S. 258, 293 (1947); *Howat v. Kansas*, 258 U.S. 181, 180-90 (1922). Thus, having failed to seek a reversal of Judge Lasker's order, Morales was precluded, as a matter of law, from defending the criminal contempt charge on the ground that Judge Lasker's order was ill-founded.

Morales was similarly not entitled to move to suppress the grand jury testimony demonstrating his contempt on the ground that this constituted "evidence derived" from any intercepted communications. 18 U.S.C. §§ 2515, 2518(9), 2518(10)(a). In arguing that he was entitled to disclosure of the wiretap orders and to a suppression hearing, Morales forgets that the transcript of his grand jury testimony contained his mere refusals to answer questions. Thus, unlike a case where the contents of wiretaps were used to elicit evidence, no evidence was obtained from Morales at all. Therefore, a motion to

suppress the record of his refusals to answer questions could not possibly have been granted under the provisions of the wiretap statute.*

* Although the Government never conceded that the questions posed to Morales were based on wiretap information, Morales argues that, if they were, this would in itself result in suppression of the transcript. However, this position assumes that grand jury questions, if based on wiretap information, would be "evidence derived" within the meaning of 18 U.S.C. §§ 2515, 2518 (9), 2518(10) (a). Morales offers no support for such a contention, which makes little sense in view of the fact that questions are not evidence. Language in *Gelbard v. United States*, 408 U.S. 41, 50-52 (1972) supports the view that the strictures of 18 U.S.C. § 2515 are directed to the evidence disclosed by a witness, not to the questions used to elicit such evidence. The Court stated as follows:

Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear. The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary probation was enacted also "to protect the integrity of court and administrative proceedings." Consequently, *to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents.*

In sum, Congress simply cannot be understood to have sanctioned orders to produce evidence excluded from grand jury proceedings by § 2515. Contrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure. And, of course, Title III makes illegal not only unauthorized interception, but also the disclosure

[Footnote continued on following page]

Gelbard v. United States, 408 U.S. 41 (1972), upon which defendant principally relies, applied 28 U.S.C. § 1826(a), and held that a witness before a grand jury may invoke as "just cause shown" under the language of said statute the prohibitions of 18 U.S.C. § 2515 (exclusion of unlawful electronic surveillance contents and evidence derived therefrom) to defend against civil contempt charges brought because the witness refused to obey a court order to testify. *Gelbard* did not specify how or when the validity of such a defense should be adjudicated. *Id.* at 61 n.22; 70 (White, J., concurring). The United States Court of Appeals for the Second Circuit, in *In re Persico*, 491 F.2d 1156, 1162 (2d Cir.), *cert. denied*, 419 U.S. 924, *rehearing denied*, 419 U.S. 1060 (1974), ruled that *in camera* inspection of court orders authorizing electronic surveillance was sufficient under 18 U.S.C. § 2518(10)(a) with respect to a contempt proceeding arising out of a witness's refusal to answer a grand jury question:

We hold that in contempt proceedings initiated when a witness who has been granted "derivative use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance

and use of information obtained through such interceptions. 18 U.S.C. § 2511(1); see 18 U.S.C. § 2520. Hence, if the prohibition of § 2515 is not available as a defense to the contempt charge, *disclosure through compelled testimony* makes the witness the victim, once again, of a federal crime. (Footnotes omitted, emphasis added).

was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful. Here there were three court orders. Inasmuch as Judge Judd conducted an in camera inspection to ascertain whether they complied with the statute and found that they did comply, Persico received all that he was entitled to receive.

Although *In re Persico* was decided in the context of a civil contempt proceeding, and the Court's analysis weighed the relationship between a coercive civil contempt proceeding and an ongoing grand jury investigation, the language of the *Persico* holding is not limited to civil contempt proceedings, but seeks "to avert further litigation by a subpoenaed witness on the legality of the surveillance." *In re Millow*, 529 F.2d 770, 773 (2d Cir. 1976).*

The finality of a *Persico* determination is important because it is made at a time when the witness must decide whether to testify based upon the adjudicated legality of the electronic surveillance.** Otherwise, a wit-

* The court's civil judgment and order of commitment pursuant to 28 U.S.C. § 1826 was a final judgment. It was entitled to conclusive effect until reversed, vacated or modified. 1B, Moore's Federal Practice, ¶ 0.416[3], at 2253 (1974 ed.). As such, matter or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended are conclusive upon the parties and their privies; and they are collaterally estopped as to such matters in other litigation. 1B, Moore's Federal Practice, ¶ 0.405[1], at 621-29.

** Defendant's reliance upon *People v. Mulligan*, 40 A.D.2d 165, 388 N.Y.S.2d 488 (1st Dep't 1972) is misplaced. *Mulligan*, which applied New York State law on electronic surveillance, was written prior to the Second Circuit's *In re Persico* decision, and dealt with a witness who was not formally apprised that there had been electronic surveillance until after he appeared before the

[Footnote continued on following page]

ness may continue in his refusal to testify in the hope that he might ultimately escape being held in criminal contempt. The relationship between a grand jury investigation and contempt proceedings arising therefrom is substantial whether civil or contempt remedies are being pursued:

We are mindful that *In re Persico* and other federal cases arose upon an adjudication of civil contempt, pursuant to 28 U.S.C. § 1826, during ongoing investigations by the grand jury. Here, the contempt was committed on December 19, 1972; petitioner was indicted on January 16, 1973, and the charge was not disposed of until petitioner's plea of guilty on June 18, 1975. Clearly, the disruption of the grand jury proceedings that would have been occasioned by a plenary suppression hearing is not the same as where the power of civil contempt is used to coerce the giving of testimony before a sitting grand jury. The very delay in the prosecution of these charges supports this conclusion. Nevertheless, the power of criminal contempt is lawfully available in aid of the state grand jury's investigations. Threatened with the possibility of a subsequent criminal prosecution, a witness will be more inclined to obey the lawful orders of the Court and grand jury. The determination of lawfulness required by *Gelbard* must be prompt even in this context, so that a witness may guide his conduct before the grand jury accordingly.

grand jury and after he had been indicted for contempt. In addition, unlike what occurred in defendant Morales' case, there had been no judicial review of the legality of the electronic surveillance prior to the witness' being directed under the sanction of contempt to testify before the grand jury.

Langella v. Comm'r of Corrections, 413 F. Supp. 1214, 1218 (S.D.N.Y.), *aff'd*, 545 F.2d 818 (2d Cir. 1976), *cert. denied*, 90 S. Ct. 1679 (1977).

The adversary proceeding required by *Alderman v. United States*, 394 U.S. 165 (1969), which was defendant's objective in seeking discovery, is not statutorily or constitutionally mandated, especially after a prior final judicial finding of legality. In *Giordano v. United States*, 394 U.S. 310 (1969), a case decided at the same time as *Alderman v. United States*, 394 U.S. 165 (1969), the United States Supreme Court stated that "a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary" (394 U.S. at 313), and Stewart, J., concurring, noted:

Moreover, we did not in *Alderman*, *Butenko*, or *Ivanov*, and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in *ex parte*, *in camera* proceedings. "Nothing in *Alderman v. United States*, *Ivanov v. United States*, or *Butenko v. United States*, *ante*, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." *Taglianetti v. United States*, *post*, p. 316.

Id. at 314.

In any event, even assuming that Morales was entitled to litigate the lawfulness of the electronic surveillance and a motion to suppress had been granted, at most he would have obtained suppression of the questions posed to him in the grand jury. Even if such suppression were granted, the Government would have been fully able to prove the contempt by either redacting the grand jury transcript or calling the foreman of the grand jury to

testify that Morales had refused to answer questions after being informed of a court order requiring him to do so. The contents of the questions were, of course, irrelevant for purposes of the criminal contempt trial. Thus, this issue raises what can be no more than harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).*

POINT III

Morales Was Not Denied Effective Assistance of Counsel.

Morales was represented in the trial court by counsel of his choice. Counsel on appeal asserts that the representation at trial was ineffective, a farce and a mockery. To make this claim Morales now points to two alleged errors in the representation provided by his first attorney. He argues that trial counsel failed to object to Judge MacMahon's questioning during a summary civil contempt hearing or to advise defendant not to respond, and that counsel failed at the criminal trial to object timely to the introduction into evidence of Government Exhibit 3 (the transcript of Morales responses to Judge MacMahon's questions on April 28, 1977). The former objection relates to representation of the defendant at a civil contempt hearing which antedated the criminal contempt indictment and which, therefore, is not the subject of this appeal. As to the latter contention, defendant does not even attempt to demonstrate that a timely objection would, or should, have been ruled upon favorably.

* Morales seeks a reversal of his conviction on the ground that the wiretap orders were not disclosed to him. Even if his point had any validity, the appropriate remedy would be a remand for disclosure of the documents and for a suppression hearing, were he able to show that he was entitled to one.

In sharp contrast to appellate counsel's focus upon an isolated failure to make a timely objection to cumulative evidence, the record as a whole indicates that trial counsel was in fact competent and experienced. In a case where the elements of proof were simple, where the Government's evidence was overwhelming, and where there were no legal defenses available to the defendant, trial counsel attempted to introduce legal defenses into the case (App. 43a-54a, 71a-75a, 98a-108a), and persuasively argued to the jury (App. 87a-88a, 136a-142a).

The standard in this Circuit for determining the effectiveness of counsel is a stringent one which has been repeatedly reaffirmed and uniformly adhered to:

[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . .

United States v. Bubar, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977), quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976), petition for cert. filed, 46 U.S.L.W. 3093 (U.S. Aug. 30, 1977) and *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). See *United States v. Taylor*, Dkt. No. 330, slip op. 2805, 2829, 2842-43 (2d Cir., April 13, 1977); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir.), cert. denied, 429 U.S. 849 (1976); *United States ex rel. King v. Shubin*, 522 F.2d 527, 529 (2d Cir.), cert. denied, 423 U.S. 990 (1975); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), cert. denied, 421 U.S. 951 (1975). Clearly the representation here was effective

and certainly not so inadequate as to shock the conscience or to make the proceedings below a farce and mockery of justice.

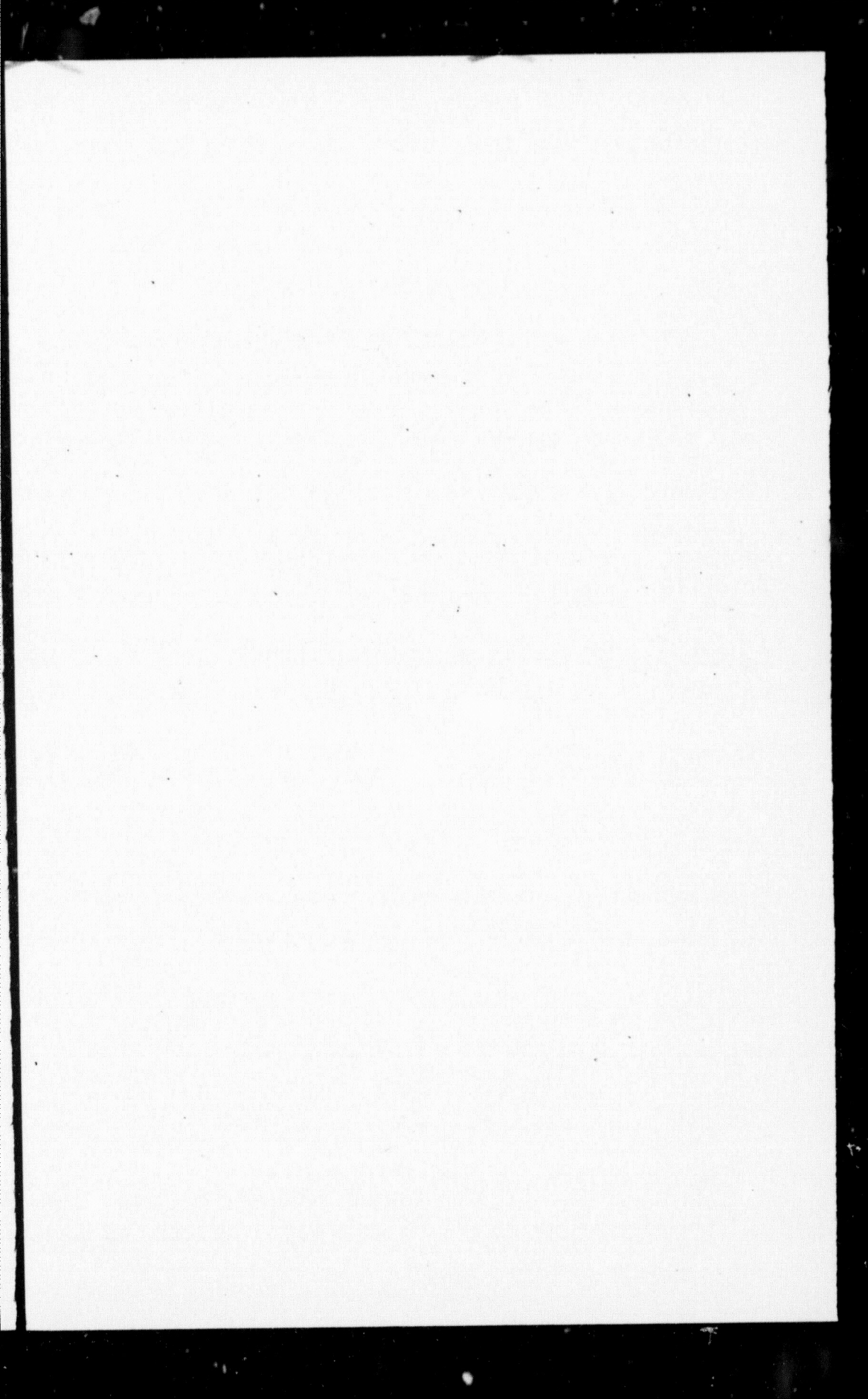
CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RICHARD J. MCCARTHY,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Richard J. McCarthy

~~JAMES H. ROSENBERG~~ being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

he served ^{two copies} ~~no copy~~ of the

3rd day of October 1977
within _____

by placing the same in a properly postpaid franked envelope addressed:

Harold O.N. Frankel, Esq.,
253 Broadway
New York, NY 10017

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

3rd day of October, 1977

Pauline F. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

